

NATIONAL CRIME VICTIM LAW INSTITUTE  
at Lewis & Clark Law School  
PROTECTING, ENFORCING and ADVANCING VICTIMS' RIGHTS

VIA E-MAIL

April 30, 2007

Clerk of the Supreme Court  
PO Box 40929  
Olympia, Washington 98504-0929

**Re: Proposed Rule Changes and Amendments**

Dear Clerk of Court:

I write to oppose the adoption of the proposed amendment to CrR 4.8, pertaining to subpoenas, because, as written, this rule fails to adequately protect the rights of crime victims.

As a law professor and Executive Director of the National Crime Victim Law Institute (NCVLI), I have been recognized by the United States Senate Judiciary Committee as a leading expert on crime victim law. I have authored the only case book on victims in criminal procedure, have authored many articles on crime victims' rights, and am consulted by lawyers and legislators throughout the United States. NCVLI is a non-profit educational organization dedicated to a fair and balanced criminal justice system through legal education, scholarship, and legal advocacy. NCVLI advocates for, and litigates issues of importance regarding crime victims' rights nationwide.

Washington is one of 33 states to amend its constitution to specifically afford crime victims rights in the criminal justice system.<sup>1</sup> Washington's constitutional amendment affording victims rights, together with Washington's passage of statutory rights for crime victims, is part of the recent national trend toward re-recognition of crime victims as proper participants in the criminal justice system with individually enforceable civil rights.<sup>2</sup> This move to re-recognize crime victims and afford them dignity, respect, and enforceable rights, is also taking root in the federal criminal justice system. *See, e.g.*, 18 U.S.C. § 3771. *See also Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006) (noting that "[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The [federal crime victims' rights act] sought to change this by making victims independent participants in the criminal justice process.").

While Proposed Rule 4.8 takes a step in the right direction by including advance notice of

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<sup>1</sup> Article 2, sec. 35 of the Washington constitution passed in 1989 with a 78% approval rating.

<sup>2</sup> *See, e.g.*, Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255 (2005); Dean G. Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 23 J.L. Med. and Ethics 73 (2004); Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282 (2003).

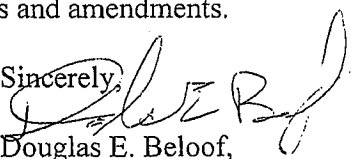
a subpoena when such subpoena is for documentary evidence or tangible things belonging to an alleged victim, or a member of an alleged victim's family or household, it falls short of adequately protecting victims. It falls short because while it requires notice to the parties, it does not require notice be to the victim him or herself. This procedure is flawed in three ways. First, allowing a subpoena to issue without notice to the very person whose records are at issue violates the state constitutional guarantee that victims be accorded "due dignity and respect." Wash. Const. Art. 1, § 35. Second, victims' statutory rights to protection may be implicated by disclosure of certain information; it is only with notice and an opportunity to be heard regarding the subpoenaed documents that a crime victim can adequately protect him- or herself. Finally, it is important to remember that there is no general constitutional right to discovery in criminal cases, *see Weatherford v. Busey*, 429 U.S. 545, 559 (1977), but confidential and personal information of a crime victim may fall within the federal constitutional right to privacy.

The Criminal Rules Advisory Committee, the committee reviewing the Federal Rules of Criminal Procedure to incorporate victims' rights as required by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, after taking considerable public comment on this very issue, is itself recommending amending Federal Rule 17 to ensure notice and an opportunity to be heard to crime victims prior to issuance of a subpoena seeking their records. Washington, which has had codified victims' rights far longer than the CVRA has been in existence should certainly do no less.

To ensure adequate protection of crime victims, any subpoena issuing in a criminal case that is seeking documentary evidence or tangible things that concern a victim should not issue without notice to, and an opportunity for, that victim to be heard in opposition to such subpoena. While notice to the prosecution may afford protection for victims in many cases, it does not guarantee such outcome; therefore the proposed rule falls short of adequately protecting victims' rights.

For the above-stated reasons I and the National Crime Victim Law Institute strongly oppose the adoption of the proposed rule changes and amendments.

Sincerely,

  
Douglas E. Beloof,  
Professor of Law, Lewis & Clark Law School  
Executive Director NCVLI